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No. 89-1508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA
and NGPL-TRAILBLAZER, INC.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF PUBLIC SERVICE COMPANY OF COLORADO, THE COLORADO ATTORNEY GENERAL, CITY AND COUNTY OF DENVER AND CITY OF COLORADO SPRINGS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the determination that the Federal Energy Regulatory Commission has preempted state law remedies for breach of a filed contract justifies the presumption that state law remedies for breach of the independent duty of good faith and fair dealing also must be preempted in order to provide "breathing room" for FERC's exclusive jurisdiction over the contract claim.

2. Whether conduct specifically intended to monopolize, which actually results in the charging of supracompetitive prices to consumers, cannot as a matter of law support a jury verdict of attempted monopolization under Section 2 of the Sherman Act because there are limits both on the defendant's ability to increase market share and its ability to continue to exercise market power for more than six years.

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INTEREST OF THE AMICI CURIAE

Public Service Company of Colorado ("PSC") is an operating public utility corporation engaged in, among other things, the purchase, distribution and sale of natural gas at retail to domestic, commercial and industrial customers in northern, central and western Colorado. The City and County of Denver ("Denver") is a municipal corporation in Colorado which is one of the largest consumers of natural gas in the State of Colorado. The Colorado Attorney General functions as an advocate for the interests of consumers in various

regulatory proceedings. The City of Colorado Springs ("Colorado Springs") is a municipality that owns and operates a public utility engaged in the purchase, distribution and sale of natural gas at retail to over 100,000 domestic, commercial and industrial consumers in the City of Colorado Springs and in surrounding El Paso County, Colorado.

Amici share a vital interest in issues that affect the relative legal rights of producers, pipelines and consumers of natural gas. The decision below has important implications for the natural gas industry, both in terms of standards of fair competition and the interplay of state and federal regulatory authority. As public utilities and purchasers of natural gas, *amici* PSC, Denver and Colorado Springs are concerned that the decision below undermines the antitrust law's protections against monopolization and supracompetitive pricing. In sum, because the decision below will have a substantial impact —both doctrinally and practically—all *amici* share an interest in having this Court address the important questions of federal law raised by the petition.

STATEMENT

1. *Amici* agree with the statement presented to the Court by petitioner, Colorado Interstate Gas Company ("CIG"), but wish to emphasize certain facts. Both parties to this case are natural gas pipeline companies engaged in the transportation and sale of natural gas in interstate commerce. See Natural Gas Act of 1938, 15 U.S.C. § 717a(6). Petitioner CIG's principal pipeline runs from south Wyoming, through Colorado, and into the Oklahoma panhandle, where it connects with other major trunk lines that carry the gas to the Midwest and elsewhere. Respondent Natural Gas Pipe Line Company of America ("NGPL") owns one of the pipelines that connects with CIG's pipeline in Oklahoma. Under the contract at issue here (the "Service Agreement"), NGPL nominated and purchased quantities of natural gas from

CIG, which transported the gas to Oklahoma where it is delivered to NGPL. Under the terms of the Service Agreement, CIG was required to reserve transportation capacity for all volumes of gas nominated by NGPL and to deliver all volumes of gas actually purchased by NGPL each day. NGPL, in turn, was required to purchase a minimum amount of gas, both on an annual and daily basis, and was required to pay a "minimum bill" if it failed to take the specified annual amount.

In 1982, construction was completed on the Trailblazer System, a $500 million natural gas pipeline system designed to transport natural gas out of south Wyoming. The Trailblazer System, which is owned in large part and economically controlled by NGPL, runs parallel to CIG's pipeline in Wyoming and intersects NGPL's pipeline in Nebraska. Because the Trailblazer System was a new pipeline, built at relatively high cost, it was forced to charge significantly higher transportation rates (20-40%) than those of other established pipelines—including CIG's competing pipeline.

Beginning in July 1983, NGPL embarked on a course of predatory conduct that led to the jury verdict in this case. The jury found that NGPL manipulated the Service Agreement with CIG in bad faith, as a means to exclude CIG from the market for transportation of Wyoming natural gas, thereby forcing customers to use the higher-priced Trailblazer System. NGPL accomplished this by selectively refusing, in bad faith, to purchase gas from CIG. Because CIG nevertheless was obligated to reserve capacity for NGPL's purchases, CIG was unable to assure "firm" transportation service to alternative purchasers. NGPL reinforced and exacerbated this intentional "tie-up" of CIG capacity by making occasional purchases of gas that were timed to interfere with CIG attempts to provide transportation for other customers and by nominating and then refusing to purchase large volumes of gas.

When NGPL's bad faith conduct forced CIG to release its rights to purchase gas from several suppliers, including its largest supplier, Champlin Petroleum, NGPL stepped in to purchase that gas directly from Champlin for transportation on the Trailblazer system. Many of CIG's customers whose transportation services were disrupted by NGPL's well-timed resumption of purchases also abandoned CIG for the Trailblazer System. Trailblazer's share of the market for transportation of Wyoming natural gas thus rose from 41% to 54% while CIG's fell from 23% to 10%.

Most important, NGPL's ability to manipulate the transportation market through the service agreement had significant detrimental effects on competition:

> Competition was injured by the exclusion of a low-cost competitor from the market. CIG's exclusion resulted in higher prices to producers, shippers, and consumers of natural gas.

Pet. App., 40a-41a. After an eight week trial, the jury returned a verdict against NGPL on a claim that it had attempted to monopolize transportation of Wyoming natural gas in violation of Section 2 of the Sherman Act and on a claim that it had violated the common law implied contractual duty of good faith and fair dealing.[1] The trial court denied NGPL's motion for judgment notwithstanding the verdict.

2. On appeal, the Tenth Circuit reversed. With respect to the claim for breach of the common law duty of good faith and fair dealing, the court of appeals noted that orders of the Federal Energy Regulatory Commis-

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[1] The jury also returned verdicts for CIG on two other claims. The jury's verdict for CIG on a tort claim for intentional interference with contractual relations, which related to the Champlin Petroleum contract, was affirmed by the Tenth Circuit. The verdict for CIG on a breach of contract claim was reversed on appeal and is not at issue here.

sion ("FERC") had established the Service Agreement, as modified by the FERC, as the filed rate for natural gas delivered pursuant to that agreement. Under the agreement, CIG collected "only fixed costs for unpurchased gas" and a higher rate for gas which actually was purchased. Pet. App., 7a. Although the claim for "bad faith" did not seek to modify the rate available pursuant to the Service Agreement, NGPL argued that awarding damages for NGPL's bad faith failure to purchase gas would allow state law to impinge upon FERC's exclusive regulatory authority.

CIG argued that the damage award based on NGPL's bad faith refusal to take gas did not conflict with FERC's tariff rulings and was not intended by FERC to be preempted by the filed rate under the contract. Pet. App., 11a.[2] The court noted that "[i]n this case, FERC was not explicitly confronted with the question of whether [NGPL's] motive for not purchasing gas would be relevant . . .," *Id.* at 11a n.9, and stated that it found CIG's argument to be "forceful." *Id.* at 11a. Nevertheless, the court decided that it could not ignore "the Supreme Court's vigorous effort to insure agency action is not blunted by state regulation." *Id.* at 12a.

According to the Tenth Circuit, FERC's right to establish filed rates "must have room to breathe." Pet. App., 12a. Thus, "limiting the scope of the FERC developed remedy for failure to purchase gas" to those actions that actually conflicted with the FERC tariff failed to give adequate deference to FERC responsibility. *Id.* In addition, the court inferred that FERC intended the preemption of a state common law claim to turn on whether

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[2] It is important to note that damages pursuant to a claim for "bad faith" failure to purchase are measured by determining what volume of gas would have been purchased had the defendant acted in good faith. Damages can then be computed pursuant to the filed rate and do not require the court or jury to set damages with reference to any rate not approved by FERC.

the state claim could be classified as a "tort" claim or a "contract" claim:

> Actions based upon tort were not meant to be pre-empted by FERC's modification of the contract, while actions based upon breach of contract were. Any other distinction would impermissibly undermine the effectiveness of FERC orders.

Id. at 14a. Because the court found that the "bad faith" claim should be characterized as a form of "contract" action, and that "FERC intended to draw the . . . line" between contract and tort claims, the verdict for CIG was reversed. *Id.*

The Tenth Circuit also reversed the verdict for CIG on the Section 2 claim which was based on CIG's allegation that NGPL's conduct was part of a scheme designed to provide the Trailblazer System with a monopoly in the long distance gas transportation market. The court acknowledged that NGPL had engaged in "predatory" conduct that resulted in the exclusion of a low-cost competitor and enabled the Trailblazer System to expand its market share from 41% to 54% while charging supra-competitive prices. Nevertheless, the court held that such a showing was insufficient, in two respects, to support a Section 2 violation.

First, the court held that the likelihood of successful monopolization is "evaluated by examining the defendant's share of the relevant market." Pet. App., 21a. An antitrust plaintiff "must show that there was a dangerous probability that the defendant's conduct would propel it from a non-monopolistic share of the market to a share that would be large enough to constitute a monopoly . . . ." *Id.* Although the court stated that the "Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power," it noted that lower courts "generally require a minimum market share of between 70% and 80%." *Id.* at 21a n.18. Ac-

cordingly, the Tenth Circuit concluded that proof of a market share of 54% was insufficient to demonstrate a "dangerous probability of successful monopolization" where the circumstances "presented no danger that Natural could do anything more than shift 13% of the market to the Trailblazer System." *Id.* at 22a-23a. Despite the evidence of specific intent and actual market power, the court concluded that, given the "limited scope" of Natural's ability to shift market share to the Trailblazer System, there "was simply no reasonable chance . . . that Natural . . . could imbue the Trailblazer System with sufficient market share to be a monopolist." *Id.* at 23a-24a.

Second, the Tenth Circuit held that even if monopoly power actually were conferred, "Trailblazer System's ability to charge supracompetitive prices could last only as long as Natural had the contractual right to tie up CIG's pipeline capacity." Pet. App., 27a. This right was "strictly limited by the duration of the Service Agreement" which would expire, by its own terms, after six years. *Id.* According to the court, the exercise of "market power must be *persistent* to make a firm a monopolist for purposes of the antitrust laws." *Id.* at 26a n.22. If, on the other hand,

> the evidence demonstrates that a firm's ability to charge monopoly prices will necessarily be temporary, the firm will not possess the degree of market power required for the monopolization offense.

Id. at 25a. Thus, because Trailblazer's exercise of market power would, at most "have a transitory [*i.e.*, six year] impact on the marketplace," the court held that the evidence was insufficient to support the jury's conclusion that there was "a dangerous probability of successful monopolization." *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

The holding that the predatory conduct of NGPL (pet. app., 19a), which resulted both in injury to petitioner and in supracompetitive prices for natural gas, is not remediable under the antitrust laws or state common law will have a significant and adverse impact in the natural gas marketplace. The Tenth Circuit's decision that state law claims for breach of the implied duty of good faith are preempted by FERC regulation conflicts with several decisions of the Fifth Circuit, with the decisions of FERC and with this Court's teaching that preemption claims are not to be "lightly infer[red]," *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 491 (1987), particularly where the inference is drawn from an agency regulation instead of an act of Congress. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716-17 (1985).

Moreover, the holding concerning the attempted monopolization claim reflects a fundamental misunderstanding of the role of market share analysis in proving a dangerous probability of success in attempted monopolization and is inconsistent with basic principles that have been established both in this Court and in other courts of appeals. *Cf. Federal Trade Comm'n* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (proof of actual anticompetitive effects obviates need for detailed market share analysis). The decision also undermines *amici*'s interest in promoting the unequivocal policy of competition which is the essence of the Sherman Act. See *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). Because of the importance of these issues to purchasers and consumers of natural gas, and indeed to the natural gas industry as a whole, this Court should grant the petition and provide guidance on these issues of vital importance.

I.

The Tenth Circuit's holding that FERC's intent to preempt state law claims for breach of the implied covenant of good faith should be *inferred* from the fact that FERC had approved the rates established by contract is inconsistent with established FERC preemption doctrine. For example, in *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987), the Fifth Circuit upheld the district court's denial of a public utility's motion to dismiss certain state law claims brought by a purchaser of power on the ground that those claims were preempted by FERC regulation under the Federal Power Act ("FPA"), 16 U.S.C. § 824, *et seq.*[3] Although the court recognized that the "filed rate doctrine" precluded any attempt to modify the FERC-approved purchase contracts, 824 F.2d at 1470-1471 (citing *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Arkla*, 453 U.S. 571), it held that certain state law claims related to the contract—including a claim based on breach of the "independent duty to act in good faith" (824 F.2d at 1469)—were not preempted. *Id.*

The court explained that the plaintiff "might be able to show that good faith negotiations would have reduced the *amount purchased* (not the rate) under the [contract]," 824 F.2d at 1471. Such a claim—which is indistinguishable from the claim that NGPL acting in good faith "would have [increased] the *amount purchased* (not the rate) under the [contract]"—"would not be preempted" by FERC regulation of the rate. *Id.* Thus, according to the Fifth Circuit, preemption based on

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[3] Because the FPA and the Natural Gas Act "are in all material respects substantially identical," *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956), this Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co.* v. *Hall* ("*Arkla*"), 453 U.S. 571, 577 n.7 (1981).

FERC approval of contract rates only precludes state law challenges to the rates themselves and not claims based on wrongful conduct such as bad faith, fraud or deceptive trade practices.[4] See *International Paper Co.* v. *FPC*, 476 F.2d 121, 125 (5th Cir. 1973) (FERC approved tariff does not constitute complete defense to all state law contract actions).[5]

The Fifth Circuit's treatment of the preemption issue—which rejects the preemption by "inference" approach of the Tenth Circuit—is entirely consistent with the regulatory preemption doctrine of this Court. There is no question that state law may be preempted by agency regulation as well as by congressional statute (*Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355 (1986); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 698-700 (1984); *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 153-54 (1982)), but the applicable

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[4] Unlike the Tenth Circuit, which rejected petitioner's claim for breach of the implied covenant of good faith on the ground that any remedy under that claim might "permit circumvention of FERC authority" through state law, the Fifth Circuit properly rejected the notion that preemption analysis requires the courts to provide "FERC's remedy . . . [with] room to breathe." Pet. App., 12a. The Fifth Circuit held that a claim under state law to set aside the filed contracts on grounds of fraud or unconscionability would not be preempted—despite the fact that "by setting aside the contracts, the district court would affect [FERC's] filed rates by eliminating them." 824 F.2d at 1472 n.9.

[5] In a related context, the Fifth Circuit, in *United Gas Pipe Line Co.* v. *FERC*, 824 F.2d 417 (5th Cir. 1987), upheld FERC orders that had approved tariffs providing that a seller of natural gas, United, was

> not liable for contract damages arising from deliveries of natural gas curtailed in compliance with a filed curtailment plan unless United, through negligence, bad faith, fault, or willful misconduct, caused the need for curtailments.

824 F.2d at 420. The court rejected United's argument that failure to preclude adjudication in the courts of all state law claims was necessary to achieve uniform federal standards. *Id.* at 426.

standards for implied regulatory preemption are much more stringent. *Hillsborough County*, 471 U.S. at 716-17.[6]

Where an agency—as opposed to Congress—has not expressly exercised its preemptive authority, federal courts should be extremely wary of implying preemptive intent from agency silence. *Hillsborough County*, 471 U.S. at 721. Thus, a court should not find agency intent to preempt the field absent an *explicit* statement of agency intent to do so. See *Fidelity Federal*, 458 U.S. at 154; *Crisp*, 467 U.S. at 705; see also Heineman & Phillips, *Federal Preemption: A Comment on Regulatory Preemption After Hillsborough County*, 18 Urb. Lawyer 589, 601-05 (1986). Nor should a court find that state law is invalidated by a conflict with federal regulation, absent a direct and irreconcilable conflict with federal standards. See *Fidelity Federal*, 458 U.S. at 153. Any ambiguity in the law or regulation which might be construed as placing limits on state governmental prerogatives should be construed in the state's favor. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963); *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 127 (1973).

The Tenth Circuit's finding of "implied" preemption by FERC is flatly contrary to these basic principles of agency preemption. The court of appeals did not find any direct conflict between FERC regulation of the contract rate and the state law claim. Nor did the court find any express statement of FERC's intent to preempt such claims. Instead, it relied on its own interpretation of the inferences to be drawn from FERC

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[6] Even where the preemption claim is based directly on an act of Congress, preemption analysis "starts with the basic assumption that Congress did not intend to displace state law." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981).

regulation and it concluded that FERC—if presented with the question—would "intend[] to draw [a] line" between actions based on contract and actions based on tort so that its rate regulation would "have room to breathe." Pet. App., 14a. The error in the Tenth Circuit's mode of preemption analysis is underscored by the fact that its "inferences" led the court to a demonstrably incorrect conclusion: FERC does not believe that permitting bad faith claims "would impermissibly undermine the effectiveness of FERC orders" (*id.*), and in fact, FERC consistently has *disclaimed* any intent to preempt state common law claims "involving negligence, bad faith or wrongful conduct." [7]

Because FERC has held that claims that natural gas companies "have not acted in good faith" are not within its jurisdiction, *Southern Company Services, Inc.*, 37 FERC ¶ 61,256 at 61,652 (Dec. 15, 1986), the decision below may leave parties injured by bad faith conduct without any remedy. More generally, the Tenth Circuit's preemption analysis would lead to wholesale preemption of common law claims in the natural gas industry and in other highly regulated businesses. The flat conflict with this Court's decision, with the Fifth Circuit's decisions on point and even with the relevant FERC deci-

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[7] *United Gas Pipe Line Co.*, 4 FERC ¶ 61,151 at 61,351 (August 9, 1978) (in cases involving claims such as bad faith, FERC "has no power to adjudicate contract liability, and . . . such liability must be determined by the courts"); see *United Gas Pipe Line Co.*, 49 FERC ¶ 61,096 at 61,443 & nn. 71-72 (Oct. 27, 1989) (FERC curtailment order limits liability in the "absence of negligence, bad faith, fault or willful misconduct"); *Transcontinental Gas Pipeline Corp.*, 35 FERC ¶ 61,340 at 61,783 (June 16, 1986) ("recovery of damages for breach of contract" is preempted by FERC orders "unless there is a showing of negligence or misfeasance"); *United Gas Pipe Line Co.*, 49 FPC 1211, 1221 (1973) (if pipeline is "guilty of bad faith, or was improvident or negligent, damages for breach of contract could be assessed [but] this is not a determination for this Commission, but properly should be resolved by a U.S. District Court").

sions make it clear that this Court should not allow the Tenth Circuit's cavalier treatment of this important federalism doctrine to go unreviewed. Given the *amici*'s interest, as a matter of federalism, in avoiding unnecessary federal nullification of state authority, see *Hillsborough County*, 471 U.S. at 721; *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), and the practical importance of preserving such claims, *amici* strongly urge the Court to review the decision of the Tenth Circuit.

II.

The Tenth Circuit's holding with respect to the antitrust claims expressly states the premise for the court's ruling as follows:

> unfair business conduct implicates the attempt provision of the antitrust laws only if that conduct threatens to create a monopoly.

Pet. App., 19a. *Amici* agree that "routine" claims of unfair competition do not give rise to remedies under the antitrust laws but *amici* strenuously object to the court of appeals' conclusion that the conduct at issue here was nothing more than a "business tort" because there was no "dangerous probability" that Trailblazer System ever could achieve monopoly power in the relevant market. The court's analysis of the "dangerous probability" element of an attempted monopolization claim under Section 2 gives rise to conflicts among the courts of appeals on an important and recurring question of federal law.

The Tenth Circuit held that proof of a market share of 54% was insufficient to demonstrate a "dangerous probability of successful monopolization" because there "was simply no reasonable chance . . . that Natural . . . could imbue the Trailblazer System with sufficient market share to be a monopolist." Pet. App. 23a-24a. According to the court, a "minimum market share of between 70% and 80%" would be required to "indicate that a defendant has monopoly power." *Id.* at 21a n.18.

This holding flatly conflicts with decisions in other circuits that have recognized that market shares of approximately 50%—or even less—are sufficient to create a jury issue on a Section 2 claim of attempted monopolization. See *Hayden Publishing Co.* v. *Cox Broadcasting Co.*, 730 F.2d 64, 68-69 & n.7 (2d Cir. 1984) (monopoly power may exist despite market share less than 50%); *Kelco Disposal, Inc.* v. *Browning-Ferris Industries*, 845 F.2d 404, 409 (2d Cir. 1988) (55%), *aff'd*, 109 S.Ct. 2909 (1989); *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579, 598-99 (7th Cir. 1971) (33%), *cert. denied*, 405 U.S. 1066 (1972); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1301 (9th Cir.) (24%), *cert. denied*, 459 U.S. 1009 (1982).[8] The Tenth Circuit's "mathematical" approach to market power ignores what other courts have recognized—*i.e.*, that market share must be viewed in conjunction with evidence of market structure, barriers to entry and defendant's actual power over price. See *Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). Moreover, other courts have expressly recognized that an undue focus on market share, at the expense of other considerations, improperly blurs the line between attempted monopoly and actual monopoly power. *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 474-75 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964).

The Tenth Circuit's holding also is contrary to the basic principle that " 'proof of actual detrimental [competi-

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[8] As one antitrust commentator has noted, "[t]he circuits are in wide disarray on the market share requirements that will support the offense" of attempted monopolization. See H. Hovenkamp, *Economics and Federal Antitrust Law* 168 n.2 (1985) (citing Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 Colum.L.Rev. 1451, 1473-75 (1973); 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 835c (1978)).

tive] effects . . . can obviate the need for inquiry into market power, which is but a "surrogate for detrimental effects." . . .' " *Federal Trade Comm'n* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, p. 429 (1986)). The Tenth Circuit's decision reflects an attempt to create a formula pursuant to which the risk of monopoly could be measured with precision, but such measurement may be misleading. More important, where—as here—there is evidence of actual anticompetitive effects sufficient to persuade a jury, resort to such a surrogate is unnecessary. See *supra*, 3-4, 6-7.

The court's willingness to tolerate anticompetitive effects—including supracompetitive pricing—for six years is inconsistent with sound antitrust policy and with the holdings of other courts of appeals. See *Peto* v. *Howell*, 101 F.2d 353, 356 (7th Cir. 1939) ("it is not to be conceived that a monopoly . . . for one day is any less a violation of the law than a monopoly . . . for thirty days or for a year"); *Dimmitt Agri Industries* v. *CPC Int'l, Inc.*, 679 F.2d 516, 533-34 (5th Cir. 1982) (attempted monopoly claim permitted despite constraints on defendant's market share), *cert. denied*, 460 U.S. 1082 (1983); see U.S. Dept. of Justice Merger Guidelines § 3.3, 49 Fed. Reg. 26,823, 26,832 (1984) (merger that permits two year price increase should be challenged). Given the existing disarray among the circuits over the standards for attempted monopolization, see Petition for a Writ of Certiorari, No. 89-1508; *supra*, 14 & n.8, these additional conflicts emphasize the need for this Court to review this decision as a suitable vehicle for bringing some needed guidance to the proper interpretation of Section 2 of the Sherman Act.

The decision of the Tenth Circuit reflects a disturbing undertone of skepticism concerning efforts to turn claims of unfair competition, or "business torts," into claims of attempted monopolization under Section 2. *Amici* recog-

nize that failure to draw the appropriate line between such claims could lead to application of standards of attempted monopoly that would be overinclusive, and thereby deter efficient conduct. See H. Hovencamp, *Economics and Federal Antitrust Law*, at 166-167. But where—as here—"a market is already highly concentrated and has a dominant firm with substantial market power, then the cost of overdeterrence is relatively low, while the cost of underdeterrence is high." *Id.* at 167. Respondent's conduct, which essentially closed off options in the marketplace (*i.e.*, to transport Wyoming gas via petitioner's pipeline) and thereby restricted availability while increasing price, is at the core of what the antitrust laws were enacted to prohibit. See R. Givens, *Antitrust: An Economic Approach* § 2.01, at 2-2 (1989). The adoption by the Tenth Circuit of standards under Section 2 that shield such "reprehensible" conduct (Pet. App., 19a) from antitrust scrutiny in a highly concentrated market should not be left unreviewed by this Court.

In sum, the petition presents important questions regarding the appropriate standards of proof to establish an attempt to violate Section 2 of the Sherman Act, particularly the proof of market power necessary to establish a "dangerous probability" of successful monopolization. Because the Tenth Circuit's ruling threatens to undermine the protections of the antitrust laws for *amici* and others and because it conflicts with basic antitrust principles and holdings of this Court and other courts of appeals, this Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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